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STATUTES—INTERPRETATION—STATUTE ALLOWING JURY TO ASSESS PUNISHMENT.—A statute authorized the jury in bringing in their verdict to inflict the death penalty in a trial for rape, although the court on its own initiative could not pronounce so heavy a sentence. The defendant pleaded guilty to secure the lighter penalty but was forced by the court to stand trial. *Held*, that the ruling was correct for otherwise a jury trial would be denied the defendant. *United States v. Green*, 41 Wash. L. Rep. 216 (Dist. Col.).

For a comment upon this case see this issue of the REVIEW, at p. 169.

SUNDAY LAWS—VALIDITY OF CONTRACT EXECUTED ON SUNDAY—SUBSEQUENT PROMISE TO PAY.—The defendant hired an automobile from the plaintiff on a Sunday for the purpose, as the court puts it, of “joy riding.” This was in violation of the Sunday law. On a subsequent secular day the defendant promised to pay the plaintiff for the ride. *Held*, that the plaintiff cannot recover. *Jones v. Belle Isle*, 79 S. E. 357 (Ga.).

The asserted policy of the law against contracts made on Sunday forbids the enforcement of such agreements by the courts. *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Day v. McAllister*, 15 Gray (Mass.) 433. The illegality of Sunday contracts, however, is not so serious that the parties lose all legal remedies. *Adams v. Gay*, 19 Vt. 358. If the agreement is wholly executory, the parties may disregard it completely and on a week day adopt its terms in a new contract. *Miles v. Janvrin*, 200 Mass. 514, 86 N. E. 785. Furthermore, if property has been transferred on Sunday without consideration, to prevent unjust enrichment the law gives the vendor the right to repudiate the whole transaction and obtain restitution of his property. *Tucker v. Mowrey*, 12 Mich. 378; *Ladd v. Rogers*, 11 Allen (Mass.) 209. *Contra, Chestnut v. Harbaugh*, 78 Pa. 473. If on a secular day the contract is adopted, then, since the vendor thereby surrenders his right to restitution, there is sufficient consideration to support the new promise by the transferee. *Williams v. Paul*, 6 Bing. 653, 4 M. & P. 532; *Sayles v. Wellman*, 10 R. I. 465; *Brewster v. Banta*, 66 N. J. L. 367, 49 Atl. 718. But where restitution is impossible by reason of the nature of the performance rendered, as in the principal case, repudiation accomplishes nothing. The policy of the law, moreover, forbids quasi-contractual liability, since it tends to enforce the unlawful agreement. Therefore the new promise in such a case lacks consideration. As the policy of the law also prevents its operation as a ratification of the original transaction, the principal case seems correct. *Pope v. Linn*, 50 Me. 83. Many authorities, it is true, appear to sanction ratification, but it is submitted that in reality their doctrine conforms to the analysis indicated above.

TORTS—NATURE OF TORT LIABILITY IN GENERAL—LIABILITY WITHOUT NEGLIGENCE—BLASTING.—The defendant in doing railroad construction work exploded a blast, the vibrations from which destroyed the plaintiff's well. The defendant had not been negligent. *Held*, that the plaintiff may recover. *Patrick v. Smith*, 134 Pac. 1076 (Cal.).

This case is opposed to American authority which holds that, in the absence of negligence, the plaintiff cannot recover when damage is caused by the vibrations from blasting. *Derrick v. Kelley*, 136 N. Y. App. Div. 433, 120 N. Y. Supp. 996; *Booth v. Rome, Watertown & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592. When, however, the damage is due to débris thrown on the plaintiff's land, the weight of authority is that liability is absolute. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Langhorne v. Turman*, 141 Ky. 809, 133 S. W. 1008. This latter class of cases is explained by the fact that there is a technical trespass. There seems, however, little distinction between setting a force in motion, knowing it will project rocks through the air, and knowing it will project vibrations through the earth and air. *Hickey v. McCabe*, 30 R. I. 346, 75 Atl. 404; *Colton v.*

Onderdonk, 69 Cal. 155, 10 Pac. 395. There seems no sufficient reason for distinguishing these two classes of cases, and the law should either treat blasting as an action at peril and give a recovery in both, or it should deny it in both and only apply the test of negligence aided by the doctrine of *res ipsa loquitur*. Probably the reason for the distinction is that the courts have felt themselves fettered by precedent in the case of the technical trespass, and yet have been unwilling to extend the doctrine to the vibration cases.

TRADE MARKS AND TRADE NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — NAME OF A PATENTED ARTICLE.—The complainant, since 1886 under sole rights to American sales, had been selling a hair brush made in England and patented in both England and America. Upon the articles sold by the complainant was stamped, "Ideal Brush, London, patented." In 1903 the patent expired. In 1905 the complainant registered the mark. The defendant recently began selling the same brushes under the name "Ideal." Held, that the defendant be restrained from using this name. *Hughes v. Alfred H. Smith Co.*, 205 Fed. 302.

Words descriptive of the article or its quality are not susceptible of appropriation as trade marks. *Raggett v. Findlater*, L. R. 17 Eq. 29; *Computing Scales Co. v. Standard, etc. Co.*, 118 Fed. 965. "Ideal," while near the line, is probably not descriptive. *Waterman v. Shipman*, 130 N. Y. 301, 29 N. E. 111. It is held, however, that a non-descriptive word, otherwise the subject of exclusive appropriation, becomes *publici juris* when applied to a patented article, and dies with the patent if the mark has come to signify the goods rather than their maker. *Wheeler & Wilson Co. v. Shaksppear*, 39 L. J. Ch. 36; *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169. It is a question of fact in each case whether the name attaches to the article or to the manufacturer. Cf. *Singer Manufacturing Co. v. Wilson*, 3 A. C. 376, with *Singer Manufacturing Co. v. Loog*, 8 A. C. 15. But the courts, by regularly interpreting the facts to show that the name designates the article only, have practically reached a rule of law that the name dies with the patent. A reason of policy given is that otherwise the patentee would perpetuate a monopoly. *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 40 N. E. 105. Two elements seem to enter into forming this monopoly: the business ability of the maker in establishing the name, and the past aid of the patent in preventing the rise of competing names. What the patentee built up from the first factor should certainly be protected; and what he enjoys from the second could usually be overthrown at the expiration of the patent by another firm selling the same article on its merits under their own name. This might be difficult when the product has no other title than that bestowed upon it by the first producer, such as "Tabasco," and "Linoleum." *New Iberia, etc. Co. v. McIlhenny's Son*, 61 So. 131 (La.); *Linoleum Manufacturing Co. v. Nairn*, 38 L. T. R. 448. In such cases the court correctly found as a fact that the name had become descriptive of the article. But when, as in the principal case, the goods have a descriptive name other than that the patentee has bestowed, fair competition by another should be less difficult. In such cases, it is submitted, the courts should find as a fact that the name signifies the patentee, not the article. The court in the principal case, however, maintains that the Trade Mark Act of Feb. 20, 1905, c. 592, § 5, disposes of the case in view of the fact that this act has been held to mean that any mark, though not a valid trade mark at the time, may be registered if in exclusive use for ten years prior to 1905. *Thaddeus Davids Co. v. Davids*, 178 Fed. 801. But as it may well be doubted whether this section of the Trade Mark Act has an application to a situation of this kind, the principal case would seem to mark a change from the former harsh treatment accorded trade marks on patented articles.